IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1555~~ 154

RONALD JAMES, et al.,

Appellants,

—v.—

ANITA VALTIERRA, et al.,
GUSSIE HAYES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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Appellees ANITA VALTIERRA, et al., and GUSSIE HAYES, et al., respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the Court, to affirm the judgment below, and in support thereof would show that plenary consideration of this appeal is unnecessary because the decision below is clearly correct.

This motion is also made pursuant to Rule 16(1)(d) of the Rules of the Court because of the following reasons. The housing shortage affecting the poor in San Jose, and in San Mateo County, has reached crisis proportions. Appellants have represented in their Jurisdictional Statement at p. 16, that HUD officials and bond counsel cannot assure

that they will take the necessary steps to alleviate this crisis until the constitutionality of Article 34 has been ruled on by this Court, and the case finally disposed of; this is true even though the court below denied appellants' motion to stay the execution of judgment. It is our understanding that while the Court will be in session for a month or more, the Court's argument term has ended; if this understanding is correct, in no way can this case be disposed of during the current term if plenary consideration is given.

CITATION TO OPINION BELOW

The opinion below is not yet reported. The full text of the opinion is attached as Appendix A, in the Jurisdictional Statement.

JURISDICTION

Jurisdiction of this appeal is founded upon 28 U.S.C. § 1253, in that injunctive relief was sought and obtained from a three judge district court, constituted pursuant to 28 U.S.C. § 2281 and § 2284, against the enforcement of a provision of the Constitution of the State of California on the ground that it violates the Constitution of the United States both on its face and as applied.

STATUTE INVOLVED

Article 34 is reported in full at page 4 of the Jurisdictional Statement.

QUESTION PRESENTED

Was the court below correct in enjoining the enforcement of Article 34 after finding it violated the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on April 2, 1970, by a District Court of three judges, granting appellees' motions for summary

judgment, declaratory judgment and permanent injunction. This case originated as two separate class actions, one filed on behalf of plaintiffs in San Jose, and the other on behalf of plaintiffs in San Mateo County. The cases were consolidated for all purposes by the court below.

Appellees are all "persons of low income," found eligible for public housing, and placed on the waiting lists of their local Housing Authorities. Of the forty-one named appellees, thirty-seven constitute a racial minority: twenty-four are Black, and thirteen are Mexican-American. They now live in overcrowded, rundown, rat-infested, roach-infested dwellings. For even this sort of unsafe, unsanitary and demeaning housing, they are required to pay rents that are exorbitant in light of their income, with the result that they are deprived of other necessaries, such as clothing. More than 2,625 families are in the same condition as appellees, and share the waiting list for low-rent housing.[1] They have not been placed in low-rent units by the local Housing Authorities because no units are available.

The only possible hope of providing safe, sanitary and decent housing for these thousands of poor people lies in the development of public housing projects under the United States Housing Act of 1937 (42 U.S.C. §§ 1401, *et. seq.*) Pursuant to that Act, local Housing Authorities may develop public housing adequate to their needs, and available within their means by the use of Federal funds. In order to implement the Housing Act of 1937, California

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1. At the time the complaints were filed there were over 2,000 families on the waiting list of the San Mateo County Housing Authority, *see* Affidavit of William G. Weman, Executive Director of the Housing Authority of San Mateo County attached to the *Hayes* complaint as Exhibit J, and 625 eligible families on the waiting list of the Housing Authority of the City of San Jose, *see* paragraph 21, page 9, of the *Valtierra* complaint. All the *Valtierra* appellees have been on the San Jose waiting list for more than one year.

enacted the Housing Authorities Law (Health and Safety Code §§ 34,200 *et. seq.*) That law included specific legislative findings that unsanitary and unsafe dwelling accommodations exist in the State where persons of low income are found to reside; that there is a shortage of safe and sanitary dwelling accommodations available at rents which low income people can afford; and that such conditions constitute a menace to the health, safety, morals, and welfare of the residents of the State.

The Housing Authorities Law also provides that a public corporate body can be formed in each county and city, and is to be known as the Housing Authority. That Authority cannot transact business or exercise powers unless the governing body of the county or city declares that there is a need for an Authority. On March 18, 1941, by Resolution No. 468, the Board of Supervisors of San Mateo County declared the need for a Housing Authority pursuant to the Housing Authorities Law. The Resolution is attached as Exhibit G to the *Hayes* complaint (Record on Appeal). On January 17, 1966, by Resolution No. 28614, the City Council of the City of San Jose declared the need for a Housing Authority pursuant to the Housing Authorities Law. The Resolution is attached as Exhibit F to the *Valtierra* complaint (Record on Appeal).

Once need is established and a Housing Authority has been activated, a professional staff is hired to develop plans for participation in leasing and construction programs. For new construction, the Housing Authority will develop an application for a preliminary loan; the loan money is used to pay for an option on a site, for the preparation of project plans, and for other development expenses. Federal law requires that the local governing body of the city or county consent before the application for a preliminary loan is sent to HUD. Thus, even before money to put an option on a site

is granted, experts from the local governing body, the local housing authority and the federal government have looked over the plans and have determined not only that the project is needed, but also that it is well planned, feasible as to cost and size, and complies with myriad technical requirements.

When a project has been completely planned and approved, the Housing Authority issues federally guaranteed, tax-free bonds for sale to the public. With the proceeds of the sale, the Housing Authority repays the preliminary loan, purchases land and constructs the units. An Annual Contribution Contract by which the purchasers of bonds are repaid, and a contract with the city or county for "payments in lieu of taxes" (usually 10% of rents) to meet the cost of municipal services, are negotiated. No local funds are used; the cost of the program is borne completely by the federal government and by the tenants of the housing units.

Article 34 interjects the referendum requirement after need has already clearly been ascertained and before any of the above technical work has been done. No one pretends approval is based on the public's expertise in the housing field. The question presented is whether or not the electorate wants public housing for the poor and minorities in their neighborhoods.

The effect of Article 34 on low income housing has been disastrous. From November, 1950 to January, 1969, 31,071 low-rent units were proposed on ballots across California. Forty-eight percent or 14,997 units were defeated. Additional units were not even proposed because of the cost of an election and the knowledge that the issue would be defeated (*see* Affidavit of William G. Weman, Executive Director of the Housing Authority of the County of San Mateo, attached as Exhibit J to the *Hayes* complaint). In

addition, Article 34 has caused California to fall behind other states in the construction of low-rent units. With 8% of the nation's poor, California has only 4% of the low income housing units. California has constructed 23.4 low income units per 1,000 low income family groups compared with 60.1 per 1,000 in Pennsylvania, 66.7 per 1,000 in New York, and 73.1 per 1,000 in Illinois.

ARGUMENT

The District Court Was Clearly Correct in Concluding That Article 34 Violates the Fourteenth Amendment to the United States Constitution.

This Court has traditionally disfavored two types of classifications: those based on race and those based on property. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Harper v. Virginia Board of Elections,* 383 U.S. 663, 668 (1966). Both classifications must be justified by more than the usual rationally related legislative objective in order to withstand constitutional scrutiny. *See McLaughlin v. Florida,* 379 U.S. 184, 194 (1964).

This case involves both these disfavored classifications. Article 34 on its face requires a referendum only for people who "lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding"; and in practice and effect, Artice 34 places a special burden on minorities because black and brown people comprise a very large percentage of those covered by its requirements, and because they are traditionally discriminated against in housing, and subject to discrimination by the public through housing referenda.

Under California and federal law, federal, state or local funds are available for various types of housing and other construction schemes, *e.g.* insured mortgages, reduced interest rates, and loan guarantees. Federally-financed low

income housing of the type governed by Article 34 is the only kind of these various construction schemes which is primarily or solely intended to benefit the poor. It is the only kind which is required by California Law to have referendum approval. Moreover, the court below found:

> The vice in this case is that Article 34 makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low income housing. Some common examples, *inter alia,* are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. [Opinion below, at Appendix A, Appellants' Jurisdictional Statement, p. ix.]

This Court has long held that a state may not constitutionally burden or exclude the poor simply because they are poor. *Edwards v. California,* 314 U.S. 160 (1941); *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966); *Griffin v. Illinois,* 351 U.S. 12 (1956), *Eskridge v. Washington State Board,* 357 U.S. 214 (1958); *Burns v. Ohio,* 360 U.S. 252 (1959); *Smith v. Bennett,* 365 U.S. 708 (1961); *Draper v. Washington,* 372 U.S. 487 (1963); *Lane v. Brown,* 372 U.S. 477 (1963); *Douglas v. California,* 372 U.S. 353 (1963); *Long v. District Court,* 385 U.S. 192 (1966); *Anders v. California,* 386 U.S. 738 (1967). There must be some other, over-riding legislative objective which justifies the imposition of a special burden on this group. Appellants have offered no legislative objective at all which requires the imposition of the referendum burden.

Last term this Court dealt with a similar problem in *Hunter v. Erickson*, 393 U.S. 385 (1969). An ordinance which required a referendum before enactment of any ban on racial, religious or ethnic discrimination in housing was held violative of the Equal Protection Clause because it:

> . . . [D]isadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or would otherwise regulate the real estate market in their favor. *Hunter v. Erickson*, 393 U.S. at 391.

Thus Article 34 would create an invidious classification even if appellees and their class were all poor and white.

It is vital to remember, however, that black and brown minority peoples comprise a very large percentage of those who would benefit from low income housing.[2] In areas such as San Mateo County the words "public housing" and "black" are synonymous and racial discrimination is still openly practised in housing.[3] It is clear that this Court re-

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2. The District Court's finding that minority groups comprise "the poor" is amply supported by (1) The uncontroverted affidavit of Franklin Miles Lockfeld, Senior Planner for the Santa Clara County Planning Department (attached to *Valtierra* Motion for Summary Judgment), (2) *Building the American City*, Report of the National Commission on Urban Problems to the Congress and to the President of the United States, Government Printing Office, House Document 91-34, pages 190-191 [The Douglas Commission Report], (3) *Summary of Housing in California*, Governor's Advisory Commission on Housing Problems, January 1963. (4) *More than Shelter, Social Needs in Low and Moderate Income Housing*, report of the National Commission on Urban Problems to the Congress and to the President of the United States, Government Printing Office, Research Report No. 8, p. 35 (1968).

3. *See* the eleven uncontroverted Affidavits attached as Exhibits A-K to the *Hayes* Motion for Summary Judgment and the Weman Affidavit attached as Exhibit J to the *Hayes* complaint. *See also*, discussion of the similarity between Article 34 (Proposition 10) and Article I § 26 (Proposition 14) in the Memorandum of Points and Authorities in *Hayes*, et al., pp. 15-17.

jects legislation which authorizes and encourages such discrimination.

> The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the State government. Those practicing racial discrimination need no longer rely solely on their personal choices. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. *Reitman v. Mulkey*, 387 U.S. 369, 377 (1967).

Article 34 also invites the voter to practice racial and ethnic discrimination in the polling place. This Court expressly stated in *Hunter v. Erickson, supra*, that such a scheme could not be constitutional:

> Although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more that. Like the law requiring specification of candidates' race on the ballot, *Anderson v. Martin*, 375 U.S. 399 (1964), § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others .... *Hunter v. Erickson*, 393 U.S. at 391.

Ohio argued, as do the appellants here, in their Jurisdictional Statement at pp. 14-15, that because the special burden was imposed by the voters, the ordinance was immune from constitutional attack. This argument was rejected in *Hunter v. Erickson*, 393 U.S. at 392:

> ... [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may gen-

erally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. [Citations omitted.] *The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.* Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size . . . . (emphasis added)

"Here, as in the *Hunter* case, the 'special burden' of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon Minorities"[4]

4. Opinion below, at Appendix A, Appellants' Jurisdictional Statement, p. ix.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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